

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 090329  
APP. DIV. DKT. NO. A-1038-22

|                       |   |                                      |
|-----------------------|---|--------------------------------------|
| STATE OF NEW JERSEY,  | : | <u>CRIMINAL ACTION</u>               |
| Plaintiff-Respondent, | : | On Petition for Certification from a |
|                       | : | Final Judgement of the Superior      |
| v.                    | : | Court of New Jersey, Appellate       |
|                       | : | Division.                            |
| KADER S. MUSTAFA,     | : |                                      |
| Defendant-Petitioner. | : | Sat Below:                           |
|                       | : | Hon. Jessica R. Mayer, J.A.D.        |
|                       | : | Hon. Lisa Rose, J.A.D.               |
|                       | : | Hon. Lisa A. Puglisi, J.A.D.         |

**PETITION FOR CERTIFICATION ON BEHALF OF  
DEFENDANT-PETITIONER**

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December 5, 2024

DEFENDANT IS CONFINED

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## **QUESTIONS PRESENTED**<sup>1</sup>

1. Whether expert testimony is necessary before a jury can be instructed on diminished capacity, as the Appellate Division recently held was required for the related affirmative defense of not guilty by reason of insanity in State v. Arrington, 480 N.J. Super. 428 (App. Div. 2024) (currently pending certification, Docket No. 090216).
2. Whether the Appellate Division erred in assuming that the only known copy of the verdict sheet—which the parties agree reflects a problem that would require a reversal of the murder conviction—is not the real verdict sheet, when no other plausible version of the verdict sheet has ever been found and there is no proof that another version exists.

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<sup>1</sup> Although this petition focuses on two particular issues, Mr. Mustafa emphasizes that his trial was infected by numerous serious problems, and he incorporates all of the arguments previously raised in the Appellate Division herein.

## **STATEMENT OF THE CASE**

### **A. The denial of the diminished-capacity instruction.**

There is no dispute among the parties that defendant Kader Mustafa was psychologically unwell at the time of the tragic incident. Mr. Mustafa had been living out of his car for some time, unemployed for five years, and suffering from regular paranoid gang-stalking delusions. As part of those delusions, Mr. Mustafa believed that people were “following him, and persecuting him, and harassing him in different ways,” “shooting laser beams into him,” “shooting electromagnetic frequencies into him,” “shooting radiation beams into him,” and that he was “being targeted with concentrated microwaves.” (7T187-2 to 21). Out of fear of these attacks, he would often sleep in a foil blanket and wear a foil hat for much of the day. At one point, Mr. Mustafa was admitted to the hospital for a week due to his belief that the imagined radiation was destroying his kidneys. He had otherwise been hospitalized for his mental health issues at another point.

Mr. Mustafa’s psychological issues came to a head when, on May 3, 2018, Mr. Mustafa was driving down the highway with his girlfriend, Nicole Fiore, who also lived out of the car with him. As they were driving, Mr. Mustafa saw a car driving past him with its high beams, and it caused him to fly into a paranoid-delusional rage. Believing that the car was part of the gang stalking,

Mr. Mustafa began tailgating the car, drove up alongside it, and fired a single shot from a handgun out of his window in the direction of the car. The car was occupied by Sciasia Calhoun, her boyfriend Herve Michel, and their baby daughter; one of their headlamps was out and they had been using the high beams to compensate since it was late at night. Michel and the baby were unharmed, but the bullet struck Calhoun in the head, ultimately killing her. After she was struck, the car slowly pulled off to the side of the road. Mr. Mustafa was arrested later that night, found parked on a relative's farm, wrapped in a foil blanket with a foil hat.

Mr. Mustafa was subsequently indicted on murder and other offenses in relation to the incident. Although initially providing notice of a not-guilty-by-reason-of-insanity affirmative defense, Mr. Mustafa ultimately waived that defense and declined to pursue it at the trial. However, the trial judge and the parties agreed that Mr. Mustafa would raise the related diminished-capacity defense, in which a jury may acquit if it finds a mental health issue precluded the defendant from forming the mental state necessary for the charged offense.

In its opening, the State noted that the jury would hear evidence of Mr. Mustafa's psychological problems and likely be tasked with considering a diminished-capacity issue. At the trial, the defense adduced substantial testimony with respect to this issue: much of the cross-examination of Fiore

involved going into detail about Mr. Mustafa's delusional beliefs; there was testimony about hospitalizations from Fiore and police; and there was discussion by multiple witnesses regarding Mr. Mustafa's habit of covering himself in foil; evidence which, if not used to support a diminished capacity defense, would be completely irrelevant and extraordinarily prejudicial.

Nonetheless, when it was time to finalize the jury charges, the trial court stated that it had removed the instruction on diminished capacity and was inclined not to include it, largely because no expert testimony had been admitted. Defense counsel noted the importance of affording Mr. Mustafa every available defense to a charge like murder, and that, "while [there's] not a DSM psychiatric diagnosis of a permanent mental illness, it's obvious he was laboring under a mental disorder at the time." (9T9-25 to 11-24). The trial court asked counsel if his position was that no expert testimony was needed for diminished capacity, and defense counsel affirmed, saying,

Yes, Judge. You would if there was an insanity defense, a legal insanity defense but we're not talking about that, we're not doing that. But there still is evidence there of a diminished capacity because of his bizarre behavior, all his statements, his psychotic behaviors, delusional complex, his persecution complex, all these things are blatant and obvious in the evidence.

[(9T11-25 to 12-12).]

Ultimately, the trial court refused to instruct the jury on diminished capacity, largely on the basis that expert testimony was needed in order for a defendant to be entitled to the instruction.

In summation, the State then went on to exploit all of the evidence the defense had adduced in anticipation of a diminished capacity defense, inflaming the jury against Mr. Mustafa. Specifically, the State argued that all of Mr. Mustafa's delusions and mental-health issues stemmed from his smoking marijuana (a legal drug at the time) and taking Adderall (a medication he was lawfully prescribed), saying "the demons that created inside of [Mr. Mustafa] I submit to you is what lead to the tragedy," (9T46-1 to 4); that at the time of the offense he was under the influence of "too much Adderall, too many conspiracy theories," (9T81-1 to 8); and that the offense happened "because of the anger and paranoia" that was created by "the way he used the prescribed drugs," (9T98-1 to 9). Mr. Mustafa was convicted of every count and sentenced to life in prison.<sup>2</sup> The Appellate Division subsequently affirmed the trial court's refusal to charge on diminished capacity.

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<sup>2</sup> Functionally, the sentence amounts to life without parole, as Mr. Mustafa will not be parole eligible until January 30, 2087, when (if living) he would be 105 years old.

**B. The jury's improperly rendered guilty verdicts on each lesser-included offense of murder.**

Unfortunately, the jury at Mr. Mustafa's trial was one that, by all appearances, did not take its duties seriously. The jury had to be admonished against using its cell phones during the trial<sup>3</sup> and for walking around the courthouse when they were supposed to be in the jury room. Multiple jurors complained about how much they would be paid for participating in the trial. Then, at the end of the trial, the jury requested to postpone deliberations until the following week and started deliberations five days after the trial court's final instructions. The jury deliberated only for about an hour (again, despite the instructions having been issued five days prior) before convicting Mr. Mustafa of every offense for a trial that lasted seven full days.

All parties had agreed that, for the murder charge, the lesser-included manslaughter offenses should be provided to the jury. When the jury read its verdict aloud in court, the trial court made no inquiry into the lesser-included offenses once the jury indicated it had found Mr. Mustafa guilty of murder. Then,

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<sup>3</sup> It is worrying that the trial court not only reminded the jurors not to use their phones during the trial but also admonished the juror who brought those concerns trial to the judge, saying in front of the whole jury, "I don't need a classroom monitor, as though we are children in grammar school." (4T107-19 to 22). Obviously, any juror noticing concerning conduct thereafter would not bring it to the court's attention.

in responding to the unanimity poll, two jurors responded “here” rather than actually responding to the poll. As to the verdict sheet, the trial court indicated it had reviewed it and would mark it C-2 as a court exhibit.

The trial court, however, never uploaded the verdict sheet to eCourts, and the version of the verdict sheet relied on for the appeal was attached to a certification by Mr. Mustafa’s now-deceased trial counsel along with a motion for a new trial. But that verdict sheet contains a critical problem that the parties agree would require a reversal of the murder conviction: it reflects the jury having found Mr. Mustafa guilty of each of the lesser-included offenses in addition to the top charge of murder.

Neither the State nor the Appellate Division have contested that this is an error that would require a reversal of the murder conviction. Rather, the Appellate Division concluded that, even though no other verdict sheet has ever been uncovered, this verdict sheet might not be the true verdict sheet. As noted, Mr. Mustafa had private trial counsel who is now deceased. Appellate defense counsel reached out to the county prosecutor’s office to ask if they had a different copy of the verdict, but they failed to produce any contrary verdict sheet or to confirm what copy of the verdict sheet was in their own file. The trial court likewise could not produce any verdict sheet marked C-2, and after a

formal documents request it provided the same verdict sheet as was appended to defense counsel's new trial motion.

Given the lack of seriousness with which the jury approached its function, and because it deliberated for only an hour five days after the trial court's final instructions, there is good reason to believe the jurors did not follow the court's instructions in rendering a verdict. Additionally, it is far more likely that the jury erred in giving the verdict and the parties below simply did not notice or did not think it was an issue than the alternative theory that defense counsel filled out a verdict sheet himself to attach and certify as the operative verdict sheet in its motion.<sup>4</sup> Nor has any party come forward with a different verdict sheet.

Nonetheless, the Appellate Division held that the record failed to establish that the only known version of the verdict sheet is in fact the true verdict sheet. Mr. Mustafa disagrees with the appellate court's conclusion. But even if the Appellate Division is correct that the whereabouts of the true verdict sheet are unknown, something that is not the fault of Mr. Mustafa, that fact must preclude his argument.

Mr. Mustafa requests that this Court accept his petition to address these important issues.

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<sup>4</sup> Defense counsel's motion made no mention or argument about the inconsistent verdicts.

## **LEGAL ARGUMENT**

### **THIS COURT SHOULD CLARIFY THAT EXPERT TESTIMONY IS NOT A PREREQUISITE FOR CHARGING A JURY ON DIMINISHED CAPACITY.**

As referenced earlier in this petition, the Appellate Division recently created a new rule in State v. Arrington, 480 N.J. Super. 428, 433 (App. Div. 2024) (currently pending certification, Docket No. 090216), that expert testimony is required for a defendant to raise the affirmative defense of not guilty by reason of insanity (“NGRI”) under N.J.S.A. 2C:4-1. The Arrington court noted that the statute placed a burden on the defendant to establish a “disease of the mind” by a preponderance of the evidence, and that such a diagnosis necessitated expert opinion. Id. at 440-41. The court also noted that the model charge for insanity refers to “medical testimony” by “medical experts.” Id. at 442-43 (citing Model Jury Charges (Criminal), “Insanity (N.J.S.A. 2C:4-1)” (approved Oct. 1988)).

The defense of diminished capacity found in N.J.S.A. 2C:4-2, while conceptually similar to an NGRI defense, is critically distinct in numerous ways. While NGRI is an affirmative defense that the defendant must prove by a preponderance of the evidence, diminished capacity involves evidence negating the State’s proofs as to the mens rea of an offense and is considered in relation to the State’s general burden to prove every essential element beyond a

reasonable doubt. State v. Delibero, 149 N.J. 90, 98-99 (1997). In fact, the Court of Appeals for the Third Circuit has held that, because diminished capacity is not an affirmative defense, a requirement that the defense prove diminished capacity by a preponderance of the evidence is unconstitutional. Humanik v. Beyer, 871 F.2d 432, 440-41 (3d Cir. 1989). Unlike NGRI, diminished capacity encompasses any “mental disease or defect,” N.J.S.A. 2C:4-2 (emphasis added), and is intended to encompass “all mental deficiencies, including conditions that cause a loss of emotional control,” State v. Galloway, 133 N.J. 631, 647 (1993).

Additionally, unlike the NGRI model charge, the diminished capacity charge makes no reference whatsoever to medical testimony or medical experts. See Model Jury Charges (Criminal), “Evidence of Mental Disease or Defect (N.J.S.A. 2C:4-2)” (rev. June 5, 2006). Indeed, the model charge explicitly does not require a specific diagnosis, instead allowing the general phrase “evidence of defendant’s mental state, including that offered as evidence of mental disease or defect” in lieu of a specified illness. Ibid. N.J.S.A. 2C:4-2 itself does not anywhere say or imply that expert testimony is necessary for diminished capacity, nor has any case ever held that expert testimony is required.

Logically, requiring a defendant to go through the exact same hoops necessary for establishing an NGRI defense by a preponderance of the evidence is completely irreconcilable with a holding that it is unconstitutional to impose

that burden on a defendant with respect to diminished capacity; it cannot be that it is unconstitutional for a defendant to be required to prove diminished capacity by a preponderance of the evidence while at the same time adhering to a rule that refuses to even submit the issue to a jury where the defendant has not conclusively established diminished capacity through expert testimony.

No other jury instruction involving the state's general burden—not voluntary intoxication,<sup>5</sup> not third-party guilt, nor even most affirmative defenses such as self-defense—requires such a high bar before it can be provided to the jury. If there is a rational basis for a diminished capacity defense based on the proofs at the trial, then it should be provided upon defense counsel's request. Cf. State v. Mauricio, 117 N.J. 402, 413 (1990) (instructions on lesser-included offenses appropriate where “a jury could have rationally construed the facts” to have sufficiently buttressed the offense).

Such a decision would be in line with other states' courts that have similarly concluded that expert testimony is not necessary for a diminished capacity defense. See, e.g., State v. MacFarland, 275 A.3d 110, 115 (Vt. 2021)(“[T]he trial court was correct that Rule 12.1(a) does not require expert

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<sup>5</sup> An instruction the trial court gave at Mr. Mustafa's trial despite its belief that “the facts underlying the intoxication charge are far less compelling than the defendant's bizarre behavior with respect to any diminished capacity charge.” (9T16-12 to 19).

testimony to present a diminished capacity defense . . . .”); State v. Bharrat, 20 A.3d 9, 19 (Conn. App. Ct. 2011) (“We do not hold that a defendant need present expert testimony to demonstrate the existence of a mental impairment, as lay testimony concerning such impairment is admissible.”).

In fact, the evidence of the kind introduced at Mr. Mustafa’s trial is of a very similar kind to what has been considered as supportive of a diminished capacity defense in other cases. For instance, in State v. Moore, this Court considered extensive lay testimony as part of the evidence requiring an instruction on diminished capacity, including: a letter from an aunt suggesting the defendant had characteristics of “split personality”; testimony that her teachers noted she had “personal problems”; testimony that she became a “hard, cold woman” after traumatic experiences and began suffering blackout spells; in addition to other lay testimony about bizarre and concerning behavior. 113 N.J. 239, 285-86 (1988); see also State v. Junta, 224 N.J. Super. 711, 714 (App. Div. 1988) (lay testimony by defendant’s mother about mental defect part of evidence requiring diminished capacity instruction). If such lay testimony is acceptable, and there is no expert testimony requirement, then the trial court should have instructed the jury on diminished capacity as requested by the defense, and as the defense had anticipated from the beginning of the trial.

Regardless of the ultimate rule imposed, it is evident that more guidance from this Court on how to handle diminished capacity is necessary so that situations like what occurred here can be avoided: trials where the defense adduces significant prejudicial evidence under the belief that a diminished capacity instruction will be provided, only to be told at the end of the trial that all of that evidence was insufficient for diminished capacity, allowing the State to then use those same proofs to inflame the jury while the defendant is left with no recourse. Clearly, some kind of pretrial hearing whenever diminished capacity is contemplated would be more appropriate so that this perverse result does not occur. But again, these situations are likely to recur if guidance is not given.

Accordingly, Mr. Mustafa respectfully requests that this Court accept his petition to address these important issues and reject an expert-testimony requirement for diminished capacity instructions.

## **POINT II**

### **THE ISSUE OF THE VERDICT SHEET APPENDED TO DEFENSE COUNSEL'S NEW TRIAL MOTION SHOULD OTHERWISE HAVE RESULTED IN A REVERSAL OF THE MURDER CONVICTION.**

Besides the failure to instruct on diminished capacity, Mr. Mustafa's murder conviction and attendant possession of a weapon for an unlawful purpose conviction should also be reversed because the only known copy of the verdict sheet shows that the jury also unanimously found he committed every lesser-included offense of murder.

The State has never contested that a jury contradictorily finding that the defendant had committed every lesser-included offense of murder would require a reversal of the murder conviction. Nor did the Appellate Division make any such legal holding. Rather, the only questions on appeal were whether the only available version of the verdict sheet was sufficiently established to be the true verdict sheet, and whether it must inure to Mr. Mustafa's detriment that the trial court did not formally preserve the verdict sheet from the trial.

“As an essential component of an accused's right to a jury trial, the right to a unanimous verdict is firmly rooted in our rules of procedure and our decisional law.” State v. Milton, 178 N.J. 421, 431 (2004). A unanimous verdict “must stand as an abiding assurance of carefully considered deliberations and a

faithfully rendered verdict.” Id. at 432. Review and control of a completed verdict sheet is primarily the domain of the trial court judge. See R. 3:19-1(b) (stating that, once the trial is complete, “[t]he verdict sheet shall be marked as a court exhibit and retained by the court pursuant to Rule 1:2-3.”). When the jury discloses its verdict to the trial court, “[p]recautions must be taken to eliminate any doubt as to the precise nature of the verdict.” State v. Butler, 27 N.J. 560, 607 (1958).

The most logical conclusion on the instant facts is that the verdict sheet appended to defense counsel’s new trial motion is the true verdict sheet. It is both in line with the disregard evinced by the jury and is a more sensible conclusion than any contrary theory of how that verdict sheet came to be. Moreover, the fact that it cannot be established with certainty that this is the correct verdict sheet because the trial court did not preserve the original should not penalize Mr. Mustafa. It should especially be concerning to accept the State’s counterarguments on this point when it has not only failed to produce any contrary verdict sheet but also declined to provide whatever verdict sheet was in its file. A conviction resulting in life without the possibility of parole requires greater integrity than can be assured by this situation.

Accordingly, Mr. Mustafa respectfully requests that this Court further accept his petition to rectify this serious injustice.

**CONCLUSION**

For the foregoing reasons, Mr. Mustafa respectfully requests that this Court grant his petition for certification to give guidance on the law with respect to diminished capacity and to provide relief on the problems involving the verdict sheet.

Respectfully Submitted,

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Public Defender  
Attorney for Defendant-petitioner

BY:   
\_\_\_\_\_  
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Date: February 21, 2025

**CERTIFICATION**

I hereby certify that the forgoing petition presents substantial questions of law and is filed in good faith and not for the purpose of delay.

  
\_\_\_\_\_  
KEVIN S. FINCKENAUER  
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